

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-2049

RUSSELL R. CARTER,

Appellant

v.

ROBERT A. MCDONALD
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENT

The Board misinterpreted 38 C.F.R. § 4.104, DC 7101 (2015) and failed to provide adequate reasons or bases for determining the Veteran's prostate cancer residuals did not warrant a compensable rating.

Appellant contends the Board misinterpreted 38 C.F.R. § 4.104, DC 7101, when it determined that the Veteran did not qualify for a compensable rating for hypertension. *Apa. Open. Br.* at 4-8. The Board misinterpreted the rating criteria when it took into account the ameliorative effects of the Veteran's hypertension medication and concluded that he didn't have diastolic pressure predominantly 100 or more, systolic pressure predominantly 160 or more, or a history of diastolic pressure predominantly 100 or more. R-10; *see Jones v. Shinseki*, 26 Vet.App. 56, 63 (2012).

The Secretary argues that the Court's holding in *Jones* does not apply in this instance, because DC 7101 "requires consideration of the frequency of medication." *Sec. Br.* at 8. However, DC 7101 shows that VA intended for the provision of a compensable rating to *not* take into account the ameliorative effect of medication. Indeed, it provided for a current compensable rating even if the Veteran's hypertension was currently non-compensable due to medication. *See* 38 C.F.R. § 4.104, DC 7101. Thus, while the DC does mention medication, it is worded to allow compensation *in spite of* the ameliorative effects of medication, rather than taking those effects into account. *See id.* Further, neither of the other prongs of the DC mention the effects of medication. *Id.* The Board misinterpreted the law when it failed to

consider whether, but for his ever-increasing hypertension medications, the Veteran would have a compensable level of hypertension. R-10.

The Secretary further argues that it would be impossible for the Board to evaluate whether the Veteran would have a compensable level of hypertension but for his medications, as there are no medical records from prior to his beginning medication. Sec. Br. at 9-10. He argues that obtaining a medical opinion to determine whether this was the case would either require the Veteran to stop taking his medication, or require that “an examiner speculate as to what Appellant’s symptomatology would have been without medication.” Sec. Br. at 9. However, the Secretary cites nothing in support of his contention that a medical professional could not evaluate whether the Veteran would meet the criteria in DC 7101, were he not on medication, based solely on the evidence of record. *Id.*

As Mr. Carter argued in his opening brief, his hypertension is uncontrolled and requires increasing amounts of medication in attempts to regain control. *See* Apa. Open. Br. at 5-6. But for the use of his medications, he may qualify for a compensable rating under any of the prongs of DC 7101. The Board misinterpreted the regulation and failed to provide an adequate statement of reasons or bases when it failed to consider this possibility.

CONCLUSION

The Board misinterpreted 38 C.F.R. § 4.104, DC 7101 when it took into account the ameliorative effects of the Veteran’s hypertension medications to find he

did not meet the criteria for a compensable rating for hypertension. Had the Board considered whether, but for his medications, the Veteran would have qualified for a compensable rating, it may have determined those criteria were met, or at the very least remanded for a medical opinion on the issue. In view of the foregoing, as well as the arguments in the opening brief, the Board prejudicially erred when it misinterpreted the law and failed to support its decision with an adequate statement of reasons or bases. This case should be remanded in order for the Board to adjudicate the issue under a proper interpretation of the law, and to support its decision with an adequate statement of reasons or bases.

Respectfully Submitted,
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